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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a founded suspicion of criminal activity can be based on circumstantial evidence suggesting that a particular person or vehicle is involved in criminal activity or must be based on direct observation of inherently suspicious activity.

I

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 595 F.2d 505.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. A petition for rehearing was denied on July 19, 1979 (Pet. App. 17a–18a). On August 9, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 10, 1979. The petition was filed on that date and was granted on June 9, 1980 (J.A. 130). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated* * *.

STATEMENT

Following jury trials in the United States District Court for the District of Arizona, respondents were convicted of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2). Each respondent was sentenced to concurrent terms of five years imprisonment on each of six counts. In addition, respondent Hernandez-Loera was fined $12,000 (J.A. 9–10).

1. The evidence at a pretrial suppression hearing showed that in early December 1976, Border Patrol officers patrolling a sparsely populated area of the Mexican border near Sells, Arizona,[1] began investigating footprints indicating that on a number of occasions groups of from eight to 20 persons had walked north from the border across 30 miles of desert and mountains to an isolated area on Highway 86, an east-west highway in Arizona (J.A. 19–30, 50–60, 101–102).[2] The officers found that the footprints followed a fairly well-defined path and that the groups travelled without resting (J.A. 23–24, 34, 57). They noticed in particular that one recurring shoeprint was of a distinctive "chevron" design (J.A. 19–21, 50–51), and that it appeared to be the lead track (J.A. 23). The officers knew that the area through which the groups passed was heavily used by aliens illegally entering the country (J.A. 28), and they concluded that a person (whom they referred to as "Chevron" (J.A. 53)) was guiding groups of aliens across the border and north to a place on Highway 86 (between mileposts 119 and 122) where they would be picked up by a vehicle (J.A. 58–59). In fact, a group of illegal aliens that had pre-

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[1] One of the officers testified that there were about five villages in the San Miguel Highway area, in which there lived a total of fewer than 100 people. J.A. 34, 49 (the San Miguel Highway is a road branching off Highway 86 at Sells, Arizona, leading south to the Mexican border (J.A. 17, 29)). See also J.A. 28, 33.

[2] In his dissent (Pet. App. 12a), Judge Chambers took judicial notice of the fact that Highway 86 "is a much smaller and less traveled road [than Interstate 10]."

viously been apprehended had identified respondent Hernandez-Loera as their guide (J.A. 21, 35, 45).

Analysis of the footprints and the times of their recurrence led the officers to a number of additional conclusions. First, they decided that the groups travelled at night, because the prints led into or over obstacles that would have been avoided in daylight (J.A. 22, 54). The officers knew that border crossings of this type are preferably made in good weather, when visibility is not impaired. They also knew that Chevron preferred to travel on or near weekends (J.A. 60). In addition, the tracks around Highway 86 indicated that the aliens, when they reached the highway, would walk parallel to it for a few miles in an eastward direction; typically, the tracks proceeded eastward at a distance of some 50 to 75 yards from the highway and then turned directly north to the highway and disappeared (J.A. 25, 40–41). From this the officers concluded that the group had been picked up by a vehicle that probably approached them from the east, because it was unlikely that the aliens, after a long overland march, would walk away from the vehicle that was coming to meet them and be facing a direction from which they could not easily identify the oncoming pick-up vehicle. The officers also concluded that, after meeting the groups, the pick-up vehicle probably returned to the east, because it was unlikely that the aliens would be walking away from their ultimate destination (J.A. 59, 84).

On the evening of January 30, 1977, Border Patrol Officers Wayne Gray and Ronald Evans stationed themselves just off Highway 86, at a point (milepost

149) approximately 30 miles east of the area where the Chevron-led groups had been picked up,[3] to watch for a vehicle that might be used in the operation (Officer Gray previously had been involved in the investigation of the chevron tracks). The officers selected that night as a likely time for Chevron to lead another group to the highway because it was Sunday and the first clear night after a three-day period of rain (J.A. 60, 64, 103, 114).[4] According to their previous tracking of Chevron, the officers assumed that if he did lead a group that night, he would not begin until after 6:00 p.m., when it got dark. Based on their experience the officers estimated that Chevron's groups covered between two and a half and three miles an hour travelling on foot (J.A. 24); accordingly, they calculated that it would take the group between eight and 12 hours to reach their pick-up point on Highway 86—*i.e.*, that they would be picked up between 2:00 and 6:00 a.m. on January 31 (J.A. 25, 62–63).

The officers were watching particularly for a camper, van or similar vehicle that would be capable of

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[3] Although at one point in his testimony (A.60–63), Officer Gray stated that he and Officer Evans had stationed themselves at milepost 114, that testimony must have been either a mistake or mistranscribed, since the officers' uncontradicted testimony was that the tracks proceeded *eastward* from milepost 119 to milepost 122, and that the officers stationed themselves approximately 30 miles *east* of there (J.A. 25, 40, 59, 60, 90). Moreover, Officer Gray subsequently testified, and Officer Evans consistently testified, that they had been stationed at milepost 149 (J.A. 64, 88, 103).

[4] Tracks that had included the chevron print had been found and followed on two previous occasions that month, on January 4 and on January 16 (J.A. 52–59).

concealing a fairly large group and that would pass them in a westward direction and return eastward approximately one and a half hours later. In their experience,[5] those were the types of vehicles most commonly used for smuggling sizeable groups of aliens, and they calculated that it would take the pick-up vehicle an hour and a half after it passed them to drive to the estimated pick-up point and return (J.A. 63–64).

During the early morning hours of January 31, the officers saw 15 to 20 vehicles pass them in a westward direction; only two of them—both pick-up trucks with camper shells—were of the kind that the agents considered likely to be useful for transporting a group of people (J.A. 64–65).[6] The first camper passed them at 4:30 a.m. (J.A. 65, 103).[7] At 6:12 a.m. this vehicle passed them again in an eastward direction (J.A. 67). The officers followed the camper and confirmed from its license plate that it was the vehicle that had passed them going west at 4:30 a.m. (J.A. 68). They then turned on their emergency lights and pulled it over *(ibid.)*. When the camper pulled over, and before Officers Gray and Evans had stopped and gotten out of

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[5]The two officers involved had substantial border patrol experience. Each had been a Border Patrol officer working in the area for two and a half to three years, and both had substantial previous law enforcement experience (J.A. 50, 102). In addition, another officer who had participated in the investigation of the chevron tracks had been a Border Patrol officer for eight years and had considerable experience in tracking (J.A. 14, 29).

[6]During the same period, the officers estimated that six to 10 vehicles passed them travelling in an eastward direction (J.A. 67).

[7]The second passed them 15 to 20 minutes later and did not, as far as the record shows, return (J.A. 66, 103).

their vehicle, respondent Cortez, who had been driving the camper, alighted from it and hurriedly approached the officers. As he did so, one of the officers noticed the left corner of the curtain on the rear window of the camper being picked up and then quickly released "like someone was looking out" (J.A. 68–69). Officer Evans remained by the patrol car, while Officer Gray met Cortez near the rear of the camper. Officer Gray identified himself and Officer Evans and told Cortez they were conducting an immigration check. Officer Gray asked Cortez if there was anybody in the camper. Cortez responded that he had picked up some hitchhikers, and he proceeded to open the back of the camper, without having been asked to do so by either of the officers (J.A. 69–70).[8] After Officer Gray determined that the six persons in the back of the camper were aliens, he placed Cortez under arrest (J.A. 70–71). Officer Evans then approached the passenger side of the camper, where respondent Hernandez-Loera was sitting. Hernandez-Loera admitted that he was a Mexican citizen. Officer Evans asked him to step out of the camper, and he was also placed under arrest. His shoes bore the distinctive chevron design on their soles (J.A. 71, 105–106).

2. The district court denied respondents' motion to suppress (J.A. 127). The court of appeals reversed, holding that the officers lacked reasonable suspicion justifying the stop of the camper (Pet. App. 1a–8a).[9]

[8] Nor had any weapons been drawn on Cortez or any search made of him prior to his voluntarily opening the back of the camper (J.A. 70, 104–105).

[9] Respondents' only Fourth Amendment claim on appeal was that the officers lacked reasonable suspicion justifying the initial

The court explained its reasons as follows (*id.* at 6a–8a; emphasis in original):

> The founded suspicion test plainly requires balancing of the facts of the particular case, see [*United States* v.] *Brignoni-Ponce*, 422 U.S. at 884–885, and in such circumstances we will not find absolutely controlling precedent since the facts will differ. A case from our court which is quite closely related is *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975).
>
> In that case, officers routinely stopped southbound vehicles in a "profile" class of automobile models thought likely to be stolen and transported from Phoenix or Tucson into Mexico. The "*profile*" was, we may say, constructed from specific, articulable facts. Nevertheless, we said: "Founded suspicion requires some reasonable ground *for singling out the person stopped* as one who was involved . . . in criminal activity" (emphasis added) (523 F.2d at 241). We pointed out that Carrizoza-Gaxiola, himself, was doing nothing suspicious. Here, too, the stop was solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle.
>
> The founded suspicion test must be read as requiring some additional fact or facts which focus suspicion on the individual or vehicle stopped.* * *

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stop. They did not contend that the subsequent discovery of the aliens and arrest of respondents was unlawful even if the stop had been proper. Such a contention would be insubstantial in any event in view of the fact that respondent Cortez voluntarily opened the door of the camper, claiming that the occupants were hitchhikers (J.A. 70).

> The officers did not have a valid basis for singling out the Cortez vehicle. They saw no one in the camper. They saw nothing suspicious about the vehicle itself. They had no specific information about illegal movement of aliens in the area that night. They observed no mechanical or equipment defects in connection with the vehicle. They observed no violation of the traffic laws as in *United States* v. *Finnegan*, 568 F.2d 637 (9th Cir. 1977). The sole suspicious fact connected with this specific vehicle was that it passed the officers' post headed west and returned headed east, both times in the pre-dawn hours. The passage of nearly two hours' time and the fact that the vehicle could have traveled to a small town and returned within that time, both furnish far too many innocent inferences to make the officers' suspicions reasonably warranted.

Judge Chambers dissented (Pet. App. 8a–16a). After fully reviewing the facts, he concluded (*id.* at 15a–16a):

> *United States* v. *Brignoni-Ponce*, *supra*, recognizes the validity of permitting an officer "to assess the facts in light of his experience in detecting illegal entry and smuggling". In this case the officers, on the basis of their experience, put together a series of clues and concluded that there was a strong possibility that Chevron would bring a group of aliens across the border on this night and hour and place, and that he would be met by a vehicle of this sort, traveling in this direction. The clues, as they analyzed them, were absolutely correct in each detail. I fail to see that suspicion, based on this sort of skillful police analysis, can be called "unfounded" within the test of *Brignoni-Ponce*. I therefore dissent.

SUMMARY OF ARGUMENT

This case presents the issue whether border patrol officers may make an investigative stop of a vehicle that they suspect—on the basis of inferences and deductions from a myriad of clues left at the site of previous illegal border crossings led by one of the suspects—contains aliens illegally in this country and their guide.

The Court has recognized in *Terry* v. *Ohio*, 392 U.S. 1 (1968), and elsewhere that police officers may briefly stop a vehicle or detain a person for investigative purposes if they have a founded suspicion of criminal activity, even though the information known to them may not amount to probable cause. In the present case, the clues left at the site of previous illegal border crossings led by respondent Hernandez-Loera and the inferences and deductions arising therefrom, combined with the border patrol officers' observation of respondents' round trip on Highway 86 between 4:30 and 6:00 in the morning, furnished the officers with a substantially founded suspicion (indeed, in our view, with probable cause to believe) that respondents were transporting aliens illegally in this country. In light of the relatively minimal intrusion occasioned by the officers' stop of respondents' camper and the substantial public interest in preventing the illegal entry of aliens into this country, the stop of the camper was, under all of the circumstances, amply justified.

As *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and other decisions by this Court have made clear, whether or not founded suspicion exists depends on the *totality* of the relevant circumstances. The standard for founded suspicion suggested by the court of appeals, which would require the direct observation at the time of the stop of evidence suggesting criminal activity, conflicts with those decisions. Moreover, the court's analysis would render the concept of founded suspicion unworkable, because almost any observed characteristic of a vehicle or a person, which may seem either entirely innocent or highly suspicious in itself, may actually be quite the opposite in light of all of the circumstances known to an officer. The fact that the officers in the present case relied largely on clues left at the site of previous border crossings led by respondent Hernandez-Loera, rather than on their direct observation of criminal activity, thus does not preclude the conclusion that their suspicion that respondents' camper was carrying aliens illegally in the country was a well-founded and reasonable one justifying a stop of the vehicle. Indeed, the type of discriminating investigative work engaged in by the officers in this case (which did not involve the use of a "profile") diminishes the number of police intrusions based on unarticulated hunches or random guesswork.

ARGUMENT

RESPONDENTS' FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN BORDER PATROL OFFICERS STOPPED THE CAMPER IN WHICH THEY WERE RIDING

A. The Officers Had A Founded Suspicion That Respondent Cortez's Camper Contained Aliens Illegally In This Country

1. *The Officers Possessed "Specific and Articulable" Facts in Support of Their Stop of Respondent Cortez's Camper*

"Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States*, 338 U.S. 160, 175–176 (1949), quoting *Carroll* v. *United States*, 267 U.S. 132, 162 (1925). We submit that the plethora of facts recited above gave Officers Evans and Gray probable cause to believe that respondents were smuggling aliens in Cortez's camper at the time and place where they were stopped.[10]

That issue does not, however, have to be reached in the present case to justify reversal of the judgment of

[10] While those with more fertile imaginations than we possess can perhaps conjure up a possible innocent explanation for the camper's early morning round trip down a relatively uninhabited road near the border, the officers, armed with considerable information regarding illegal border crossings in the area, reached what seems to us to have been an almost inescapable conclusion that the camper's mission was probably alien smuggling.

the court of appeals. Beginning with *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court has established that police officers may briefly stop a vehicle or detain a person for investigative purposes if they can point to specific facts that are reasonably indicative of possible criminal activity, even though the facts do not amount to probable cause—*i.e.*, a stop may be based on facts that support a reasonable suspicion, albeit not a reasonable conclusion, of criminality. Because the only intrusion complained of here was the officers' brief stop of Cortez's camper for the purpose of questioning its occupants, the only issue before this Court is whether there was reasonable, or founded, suspicion justifying that minimal intrusion. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 874 (1975).

In *Terry*, *supra*, this Court " 'balanc[ed] the need to search [or seize] against the invasion which the search [or seizure] entails' " (392 U.S. at 21, quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 534–535, 536–537 (1967)) and held that a protective frisk for weapons (entailing not only a seizure but a limited search of the suspect) was reasonably warranted, in the absence of probable cause, by "specific and articulable facts * * * taken together with rational inferences from those facts * * *." 392 U.S. at 21. See *United States* v. *Brignoni-Ponce*, *supra*; *Adams* v. *Williams*, 407 U.S. 143 (1972). The lawfulness of a seizure has been said to depend on "(i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise." *United States* v. *Mendenhall*, No. 78–1821 (May 27,

1980), slip op. 2 (Powell, J., concurring). See *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979); *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 880.

In *United States* v. *Brignoni-Ponce*, *supra*, this Court enunciated the relevant principles specifically in the context of vehicle stops by Border Patrol officers for the purpose of questioning the vehicle's occupants about their citizenship and immigration status. Although the Court concluded that the single factor relied on by the agents in that case—the apparent Mexican ancestry of the occupants—did not furnish reasonable grounds justifying the intrusion, it made clear that other circumstances could furnish reasonable suspicion justifying what the Court recognized (422 U.S. at 880, 883) as a "modest" intrusion on the freedom of movement of travellers. Thus, the Court stated (422 U.S. at 884–885 (citations and footnote omitted)):

> Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. * * * They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. * * * Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used

> for transporting concealed aliens. * * * The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. * * * The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. * * * In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling. *Terry* v. *Ohio*, 392 U.S., at 27.

Far from failing to satisfy the *Brignoni-Ponce* standard as the Ninth Circuit held, this case does not even begin to test its outer boundaries. Indeed, most of the factors suggested by the Court in *Brignoni-Ponce* are present in this case. Here, the officers took into account the characteristics of the area they were patrolling—its sparse population and proximity to the Mexican border. They were also well aware that this sparsely populated area was heavily used by aliens illegally entering the country. As *Brignoni-Ponce* suggests, the officers gave consideration to the type of vehicle that could conceal a substantial number of persons and therefore concluded that their target was a van, pick-up, camper shell, U-Haul truck or something of that nature. They also considered relevant respondents' behavior in making a round trip excursion on Route 86 between 4:30 and 6:00 in the morning—a time that not only corresponded with their inferences regarding the likely occasion for the smuggling opera-

tion, but which also rendered an innocent explanation for the trip most unlikely.[11]

Perhaps most significant in the context of this case is *Brignoni-Ponce's* admonition to "consider information about recent illegal border crossings in the area" (422 U.S. at 885). For in the present case, not only were the officers generally aware of a high degree of alien smuggling in the area, they were also aware of previous smuggling expeditions led by the very man whom they suspected, "Chevron" (respondent Hernandez-Loera), from which they were able to deduce a likely and very specific modus operandi in terms of the time of day, the time of week, the exact route that the aliens would be taking, and the particular movements of the suspected pick-up vehicle.

What transpired in the present case is thus the exact opposite of the random seizures that this Court struck down in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), and *Brown* v. *Texas*, 443 U.S. 47 (1979), or, indeed, of the inadequately justified stop in *Brignoni-Ponce* itself. In contrast to the lack of either probable cause or reasonable suspicion to justify the seizures that were made in those cases, the materialization of the expected modus operandi, in the form of Cortez's camper reappearing before the officers at milepost 149 at 6:12 a.m. on January 31, 1977, clearly provided them with "specific and articulable facts," if not with probable cause, that amply justified the limited intrusion that followed.

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[11] As Judge Chambers stated in his dissent (Pet. App. 14a): "It was possible that this camper was making a round trip to Sells; but it is hardly probable."

2. *The Intrusion Involved in the Stop Was Minimal and the Public Interest in Preventing the Illegal Entry of Aliens is Substantial*

The officers' stop of respondent Cortez's camper and questioning of respondents was no less "modest" an intrusion upon its occupants' freedom of movement than was the investigative stop that was before this Court in *United States* v. *Brignoni-Ponce, supra.* In both cases, the expressed limited purpose of the stop was to question the occupants of the vehicles about their citizenship and immigration status (422 U.S. at 874; J.A. 81), and in neither case was that purpose exceeded until either consent to do so was obtained or probable cause to do so was established. In *Brignoni-Ponce,* this Court described the stop at issue therein as involving "no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside" (422 U.S. at 880 (footnote omitted)). Similarly, in the present case, the officers' purpose in stopping respondent Cortez's camper was to question its occupants briefly about their citizenship and immigration status. No search of the camper or any of its occupants occurred until Cortez voluntarily opened the back door of the camper. Although even such a limited seizure as is at issue here is somewhat more intrusive than the mere approach to and questioning of an individual in an airport concourse that was involved in *United States* v. *Mendenhall, supra,* it is clearly less intrusive than the "careful exploration of the outer surfaces of a person's clothing all over his or her body

in an attempt to find weapons" (392 U.S. at 16) that was held in *Terry* v. *Ohio*, *supra*, to be warranted by "specific and articulable facts" short of probable cause.

Moreover, this Court previously has recognized the important public interest in maintaining effective measures to prevent the illegal entry of aliens at the Mexican border, as well as the difficulties faced by law enforcement agencies in attempting to do so. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 551–552 (1976); *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 878–879; *United States* v. *Ortiz*, 422 U.S. 891, 900–914 (appendix of concurring opinion of Burger, C.J.); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 276–277 (1973) (Powell, J., concurring). The enforcement of the Nation's immigration laws is important for the protection of the illegal aliens who are smuggled into this country as well as for the protection of those, both citizens and aliens, legally here. *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 879.

Terry and its progeny require a balancing, on the one hand, of the intrusiveness of the seizure or detention against, on the other hand, the strength of the public interest and the reasonableness of the suspicion possessed by the officers. We submit that when one balances the minimal invasion of freedom of movement involved in stopping a vehicle for the purpose of questioning its occupants concerning their citizenship and immigration status against the strong public interest in preventing the illegal entry of aliens into this country and the myriad of "specific and articulable" facts available to the officers here, ranging from such details as "Chevron's" footprint in the desert to the approxi-

mate time of the aliens' pick-up, one cannot but be convinced of the reasonableness—indeed of the requisiteness—of the officers' actions in stopping respondent Cortez's camper.

B. The Existence of Founded Suspicion is Not Precluded Because the "Specific and Articulable" Facts Upon Which it is Based Are Circumstantial Evidence

Notwithstanding all of the foregoing specific and articulable facts, the court of appeals' majority concluded that there was not a certain kind of additional information—namely, the officers' direct observation of some aspect of the vehicle or its occupants that in and of itself indicated criminal activity, such as, the court suggested (Pet. App. 7a), mechanical or equipment defects or a violation of the traffic laws.[12] The court's decision thus appears to stand for the legal proposition that founded suspicion can never be established on the basis of what is commonly referred to as circumstantial evidence. That proposition of law finds no support in this Court's decisions,[13] and it conflicts

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[12] The court also stated (Pet. App. 7a) that the officers "had no specific information about illegal movement of aliens in the area that night." Although we submit that such "specific information" is not a necessary ingredient for reasonable suspicion, it is difficult to see how such information would have aided the officers under the court of appeals' own view, since it would not have constituted "some additional fact or facts which focus suspicion on the individual or vehicle stopped" *(ibid.)* and would not have provided further grounds for "singling out the Cortez vehicle" *(ibid.)*.

[13] In *Adams* v. *Williams*, 407 U.S. 143 (1972), this Court rejected the notion that reasonable cause for an investigative stop

squarely with the standards that *Brignoni-Ponce* established specifically with respect to the Border Patrol. Moreover, that proposition would eviscerate and render unworkable the concept of reasonable, or founded, suspicion, which is based on the *totality* of the relevant circumstances.

The standard suggested by the court of appeals conflicts with *Brignoni-Ponce* because it would make most of the factors there identified as significant by this Court—the characteristics of the area, its proximity to the border, usual traffic patterns, previous experience with alien traffic, recent border crossings and the type of vehicle stopped—either irrelevant or superfluous. Unless there is some additional and specific aspect of the vehicle that is directly observed and that itself creates a reasonable suspicion of criminal activity, no combination of those other factors apparently can furnish reasonable suspicion satisfying the court of appeals, no matter how compellingly they indicate to a person of reasonable caution that a limited stop for further investigation is warranted. Yet *Brignoni-Ponce* clearly established that all of the factors identified by the Court are relevant; the fact that the Court stated that each of those factors "may" be considered (422 U.S. at 885) further indicates that no single one of those factors must be present in every case.

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can only be based on an officer's personal observations (*id.* at 147). As the Court stated, "[i]nformants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation" *(ibid.)*.

More generally, the decision below makes meaningless the entire concept of founded suspicion. Founded suspicion exists when the *totality* of relevant circumstances would lead a person of reasonable caution to suspect criminal activity and to conclude that a limited intrusion for the purpose of further investigation is warranted. See *United States* v. *Mendenhall, supra* (Powell, J., concurring); *United States* v. *Brignoni-Ponce, supra; Terry* v. *Ohio, supra.*[14] The relevant circumstances in the present case included the following: a particular guide had been repeatedly leading large groups of illegal aliens on foot across the Mexican border through the same 30 miles of sparsely-populated terrain to a relatively uninhabited section of an east-west highway (Route 86), along which the guide and the aliens would walk in an eastward direction to milepost 122, where they apparently were picked up, presumably by a van, camper, or similar vehicle capable of concealing a group of eight to 20 people. From these facts the officers had deduced that the pick-up vehicle came from the east, picked up the aliens, and then returned to the east, since it was unlikely that the aliens would walk in the opposite direction from their ultimate destination or in a direction from which they could not keep a lookout for the vehicle that was to meet them. Their observations further indicated that the guide traveled at night and usually on or near weekends; they were also aware

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[14] While listing the factors it considered relevant in *Brignoni-Ponce*, the Court specifically noted that "[e]ach case must turn on the totality of the particular circumstances" (422 U.S. at 885 n.10).

that illegal border crossings are usually made in good weather, when visibility is good; the night of Sunday, January 30, 1977, was the first clear night after a three-day rainy period. At 4:30 a.m. on January 31, 1977, respondent Cortez's camper, traveling westward, passed Officers Gray and Evans, who were positioned at milepost 149, approximately 30 miles east of the customary pickup point; at 6:12 the same morning, the camper again passed the officers, backtracking its way eastward.

To reduce the foregoing collection of facts, as the court of appeals did, to the statement that a specific vehicle "passed the officers' post headed west and returned headed east, both times in the pre-dawn hours" (Pet. App. 7a) is to ignore all of the clues left by "Chevron" and his groups and all of the inferences and deductions available to the officers therefrom. The court thereby ignored the totality of the circumstances in favor of a requirement of a single determinative indication of criminal activity.

Furthermore, the court then plainly erred by discounting the thus reduced statement of known facts and inferences therefrom as "furnish[ing] far too many innocent inferences to make the officers' suspicions reasonably warranted" (Pet. App. 8a). The fact that each of the individual circumstances may itself be consistent with innocent behavior does not preclude the totality of the circumstances from establishing founded suspicion. See *United States* v. *Mendenhall*, *supra*, slip op. 4 (Powell, J., concurring); *Terry* v. *Ohio*, *supra*, 392 U.S. at 22; *United States* v. *Price*, 599 F.2d 494, 502 (2d Cir. 1979). Certainly the facts that

this Court held warranted a stop and frisk in *Terry* or said could justify an automobile stop in *Brignoni-Ponce* were consistent with innocent behavior. Virtually any set of facts can be said to be consistent with innocent behavior even if a high probability of criminal activity is indicated.[15] Indeed, it is inherent in the concept of reasonable suspicion that the probability of an innocent explanation for the known facts outweighs a guilty one; if it did not, there would be probable cause. Thus, the substantial possibility of an innocent explanation is essentially immaterial to an assessment of the lawfulness of the limited intrusion entailed in an investigative stop; the pertinent inquiry is whether there is a rational and articulable basis for suspecting criminal activity.

Moreover, the standard suggested by the court of appeals is unworkable. The materiality of any single item of information necessarily depends on all of the information known to the officer, and the court of appeals' distinction between directly observed evidence suggesting criminal activity—which it believes must be present to furnish reasonable suspicion—and other circumstances suggesting criminal activity is a meaningless distinction in this context. Almost any observed characteristic of a vehicle or a person that may seem entirely innocent in itself may, on the basis of the totality of the known circumstances, be quite indicative of criminal activity to a person of reasonable cau-

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[15] Even the reasonable doubt standard does not require an instruction that the evidence be inconsistent with some conceivable hypothesis of innocent behavior. See *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

tion. Conversely, almost any observed characteristic that might be quite suspicious in some, or even most, contexts might actually be indicative of innocence in light of all of the circumstances known to an officer. In short, there would ordinarily be no meaningful way by which an officer could conclude that a given set of directly observed characteristics of a vehicle or its occupants does or does not indicate criminal activity unless he considers the total context and all other circumstances known to him.

In sum, the court of appeals' decision imposes an unworkable and unsound standard on law enforcement agencies operating within its jurisdiction, a standard that would encourage officers to focus on specific kinds of observations that may not be particularly probative in the circumstances and would deter them from making rational decisions on the basis of thorough background investigations.

Finally, the court of appeals characterized the stop in this case as "solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle" (Pet. App. 7a). In so doing, the Ninth Circuit erred. First, it fundamentally misunderstood the nature of a "profile." Contrary to the distinction drawn by the court below, a profile is comprised of the very type of facts that the court of appeals complained the officers in this case lacked, that is, facts associated with an individual, his appearance and his behavior. See, *e.g.*, *United States* v. *Mendenhall*, *supra* (Powell, J., concurring), in which drug enforcement officers' approach and questioning of an individual in an airport concourse was deemed

proper on the strength, at least in part, of the following facts, all of which corresponded with characteristics of the Drug Enforcement Administration's drug courier profile: the suspect's nervousness, the fact that she was the last passenger to deplane, her scanning of the entire gate area, and the facts that she had no baggage and changed from an American Airlines to an Eastern Airlines flight (slip op. 5–6). Thus, contrary to its expressed intention, what the Ninth Circuit in fact appears to have condemned in the instant case was the absence of observation of facts that would coincide with some predetermined profile.

In reality, no profile, as that term is commonly used, was employed in this case.[16] A profile is a set of typical characteristics of a particular type of criminal, such as an airplane hijacker or a drug courier, developed by law enforcement agents on the basis of their pooled experience; it may be used as part of the basis for stopping a person matching the profile, quite apart from the agents' possession of specific information that the person is engaged in criminal activity. The information relied on by the officers in this case thus was not a profile,[17] because it was developed as a result of weeks of careful investigation of the specific, indi-

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[16] For example, the Court is not being asked herein to validate every stop of a camper making an early morning one and one-half hour round trip on a lightly-travelled road in a sparsely-populated area near the Mexican border.

[17] The main factor that could arguably be characterized as "profile" information is the focus on use of a large vehicle, such as a camper, since Border Patrol agents are aware of the frequent use of such vehicles for alien smuggling. Even that is not truly a "profile" use here, since the agents' investigation of Chevron's specific activities had revealed that large groups

vidualized pattern of criminal activity that was ultimately detected.[18]

The operational features of the smuggling scheme that led to respondents' apprehension were in the main discerned not from the agents' prior general experience with alien smuggling, but from clues left at the scene of respondent Hernandez-Loera's prior border crossings that indicated the time, place and method thereof.[19] To find clues and deduce from them identifying features of the culprit is the essence of good detective work. Contrary to the suggestion of the Ninth Circuit (Pet. App. 3a), this type of investigative work diminishes the number of police intrusions based on unarticulated hunches or random guesswork. Compare *Delaware* v. *Prouse*, *supra*. In our view, such law enforcement efforts should be applauded, not disparaged or discouraged, by the courts.

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were involved, thus necessitating the use of a vehicle with substantial capacity.

[18] Although we are not relying on such a profile in the present case, we do maintain that a correlation of observed facts with a discriminating profile should not be disregarded, but is in fact a significant and legitimate consideration in determining the permissibility of a stop. We have never suggested, however, that a profile in itself automatically constitutes a standard of either probable cause or reasonable suspicion. The reasonableness of a stop must always be measured by the totality of the circumstances. See *Reid* v. *Georgia*, No. 79-488 (June 30, 1980) (per curiam); *United States* v. *Mendenhall*, *supra*, slip op. 6 n.6 (Powell, J., concurring).

[19] One aspect of the officers' description of respondents' smuggling scheme that appears to have been based on alien smuggling operations in general was the type of weather conditions under which the officers expected alien smuggling to be carried out. The officers' consideration of this factor surely could not be improper simply because of its general validity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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